STATE OF MICHIGAN
IN THE SUPREME COURT

Rita Kendzierski, Bonnie Haines, Greg Dennis, Louis Bertolini, John Barker, James Cowan, Vincent Powierski, Robert Stanley, Alan Moroschan, and Gaer Guerber, on behalf of themselves and those who are similarly-situated,	Supreme Court No. 156086
	COA Case No. 328929
	Lower Court: Macomb County
Plaintiffs-Appellee,	Circuit Court Case No. 10001380 CK
v.	
County of Macomb,	
Defendants-Appellants. /	

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF
BY THE STATE BAR OF MICHIGAN, PUBLIC CORPORATION LAW SECTION

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The State Bar of Michigan, Public Corporation Law Section ("Public Law Section" or "Section") moves pursuant to MCR 7.311 and 7.312(H) for leave to file an *amicus curiae* brief in support of the County of Macomb's Application for Leave to Appeal. In support of this Motion, the Public Law Section states as follows:

1. The Michigan Municipal League, Michigan Association of Counties and Michigan Townships Association are submitting the attached Amicus Brief to the Michigan Supreme Court in support of the County of Macomb's Application for Leave. Under MCR 7.312(H)(2), the Michigan Municipal League, Michigan Association of Counties and Michigan Townships Association are not required to file a motion seeking leave to file an Amicus Brief, as they are associations representing political subdivisions of the State of Michigan. However, the State Bar of Michigan, Public Corporation Law Section – which seeks to join in the attached Brief submitted by the Michigan Municipal League, Michigan Association of Counties and Michigan Townships Association – is required to file a Motion seeking leave to do so.

2. The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 520 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund (the "Legal Defense Fund"). The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This Motion for Leave to file an *amicus curiae* brief is authorized by the Legal Defense Fund's Board of Directors, whose membership includes the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys.

3. The Michigan Association of Counties is an alliance of Michigan counties working to enhance county government through advocacy, shared services and education. Founded in 1898, the Michigan Association of Counties is the only statewide organization dedicated to the representation of all county commissions in Michigan. The Michigan Association of Counties is a nonpartisan, nonprofit organization that advances education, communication and cooperation among county government officials in Michigan. The Michigan Association of Counties is the counties' voice at the state and federal level, providing legislative support on key issues affecting counties. The Michigan Association of Counties has authorized Miller Canfield to file an amicus brief on its behalf in this matter.

4. The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of more than 1,230 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, exchange of information and guidance to, and among, township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statute of the State of Michigan. The Michigan Townships Association has authorized Miller Canfield to file an amicus brief on its behalf in this matter.

5. The State Bar of Michigan, Public Corporation Law Section is a voluntary membership section of the State Bar of Michigan, comprised of approximately 600 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to public law. The Section provides education, information and analysis about issues of concern to its membership and the public through meetings, seminars, the State

Bar of Michigan website, public service programs and publications. The Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Section participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous *amicus curiae* briefs in state and federal courts. The Section's Council, the decision-making body of the Section, is currently comprised of 21 members. The filing of this Motion and the amicus curiae brief is authorized by the Council. The position expressed in this Motion and any amicus curiae brief is that of the Section only and is not the position of the State Bar of Michigan.

6. This lawsuit concerns the legal principles that apply when determining whether a Michigan municipality made a promise to provide vested lifetime, unalterable health benefits to its retirees. A correct legal interpretation is critically important, because an erroneous conclusion that a municipality is required to provide such vested benefits can have a profoundly negative effect. Specifically, such unfunded liabilities have the potential to bring municipalities to their knees by saddling them with crushing debt with no corresponding offsetting revenue source. In the last ten years, Michigan has witnessed the cost of such health benefits force Michigan cities into financial emergencies, emergency management and even bankruptcy as seen in the City of Detroit.

7. The interests of Michigan municipalities and counties are coextensive with the interests of the citizens of Michigan. As municipalities struggle under the weight of providing retiree health benefits, citizens residing within those municipalities experience reduced city services, and potentially reduced health and safety assistance, as those cities struggle to balance budgets with vastly increased liabilities. As in the past, those municipalities that have struggled to address burgeoning liabilities for retiree health benefits have turned to the state for either

financial assistance, or the appointment of an emergency manager. The issues in this case therefore substantially affect not only the County of Macomb, but also the economy of the State of Michigan as a whole, including economic growth, and the ability of Michigan to compete in the regional, national, and global marketplaces.

8. As set forth in the attached amicus brief, the issues before the Court are of critical concern for all municipalities that have provided, currently provide or are considering providing employees with health benefits upon retirement. The Michigan Court of Appeals' decision ignored establish precedent regarding the interpretation of agreements to provide health benefits to retirees, disregarded durational language regarding the expiration of the collective bargaining agreements and the obligations contained within them, and utilized unwarranted and unsupported inferences in favor of finding a non-existent promise to provide retirees with lifetime health benefits, despite the Court of Appeals conceding that the collective bargaining agreements did not expressly provide for vested, lifetime health benefits. In doing so, the Court of Appeals' decision vastly expands the potential that a municipality will be required to provided vested, lifetime retiree health benefits despite never actually agreeing to provide such benefits in perpetuity. The Michigan Municipal League, Michigan Association of Counties, Michigan Townships Association and State Bar of Michigan, Public Corporation Law Section members have a significant interest in the application of correct legal principles governing when collective bargaining agreements create a promise to provide vested lifetime retiree health benefits, and correcting a Court of Appeals decision that goes far outside the lines of an appropriate analysis of such agreements.

WHEREFORE, the Michigan Municipal League, Michigan Association of Counties, Michigan Townships Association and State Bar of Michigan, Public Corporation Law Section

respectfully request that the Court grant their request to participate as amicus curiae and consider the attached brief.

Respectfully submitted,

Dated: August 28, 2017

/s

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AMICUS CURIAE BRIEF
OF THE MICHIGAN MUNICIPAL LEAGUE, MICHIGAN ASSOCIATION OF COUNTIES, MICHIGAN TOWNSHIPS ASSOCIATION AND STATE BAR OF MICHIGAN, PUBLIC CORPORATION LAW SECTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Rules

STATEMENT OF QUESTIONS PRESENTED

The Michigan Court of Appeals held that, even though collective bargaining agreements between the County of Macomb and its unions contained no language expressly stating that County employees would be entitled to vested lifetime health benefits upon retirement, those collective bargaining agreements somehow obligated the County to provide vested health benefits for life to those employees upon their retirement. To reach that conclusion, the Court of Appeals relied upon impermissible inferences in favor of vesting that have previously been rejected by the United States Supreme Court, the United States Court of Appeals for the Sixth Circuit, United States District Court for the Eastern District of Michigan and the Michigan Court of Appeals.

Are Michigan Courts permitted to re-introduce the doctrine of reasonable expectations, thereby permitting courts to substitute what a particular judge believes is reasonable in place of what the parties to the contract actually agreed to?

May the courts utilize retiree-friendly inferences in favor of finding a promise to provide vested, lifetime health benefits? In the absence of express vesting language, are Michigan Courts permitted to ignore, and fail to apply, general durational clauses in collective bargaining agreements stating that the agreements (and by definition, all promises contained within those agreements) terminate within three years? Should Michigan Courts instead decide questions of contract interpretation based on the plain meaning of the contract, and the intent of the parties?

Should the Michigan Supreme Court grant leave to appeal to resolve all of these important questions of Michigan retiree health benefit law?

I. INTRODUCTION

In its decision, the Michigan Court of Appeals committed serious and reversible error by relying on the now-defunct rule of reasonable expectations, in violation of *Wilkie v Auto-Owners Ins Co*, 469 Mich 41 (2003), when it substituted what it believed was reasonable in place of what the contracting parties actually agreed to in the relevant labor agreements. Compounding this error, the Opinion neglected to apply the "first out" rule, which requires courts to follow prior published opinions, or declare a conflict, and instead charted its own course as if no prior precedent existed.

Moreover the Court of Appeals inexplicably followed Sixth Circuit retiree health benefit law that, in 2015, was conclusively overruled by the United States Supreme Court. From the 1980s through the early 2000s, the Sixth Circuit approached each retiree health benefit case with retiree-friendly inferences designed to place a thumb on the scale in favor of finding the existence of a contractual promise to provide lifetime, vested benefits to retirees. *UAW v Yard-Man, Inc*, 716 F2d 1476 (6th Cir 1984) was the genesis of these inferences. Relying on the *Yard-Man* inferences, the Sixth Circuit ignored the intent of contracting parties for decades, resulting in decisions favoring retirees in nearly all retiree health benefit lawsuits involving collective bargaining agreements. In 2015, the United States Supreme Court corrected this mistaken and flawed approach, finding that *Yard-Man* and its progeny do not represent ordinary principles of contract law, distort any attempt to ascertain the intention of the parties and improperly impose a court's own suppositions indiscriminately across entire industries and contracts. *See M&G Polymers USA, LLC v Tackett*, 135 SCt 926 (2015). That same year, in *Harper Woods Retirees Association v Harper Woods*, 312 Mich App 500 (2015), the Michigan Court of Appeals adopted *Tackett* and rejected the use of *Yard-Man* and its flawed inferences and suppositions.

Here, the Michigan Court of Appeals has ignored recent Sixth Circuit and Michigan Court of Appeals decisions focusing on ordinary contract interpretation. In substance, if not in name, the Court of Appeals re-applied the abandoned *Yard-Man* inferences in derogation of controlling law. This decision has far-reaching implications for every municipality in Michigan that provides, provided, or may provide health benefits to its retirees pursuant to collective bargaining agreements. Correct application of ordinary principles of contract interpretation requires plaintiffs to provide actual proof of an intent to provide lifetime health benefits, evidenced by contractual language making it clear that lifetime and unchangeable benefits were intended. The *Kendzierski* decision ignores controlling law, and thereby absolves Plaintiffs from pointing to actual lifetime or vesting language in a collective bargaining agreement. Instead, the decision let the Plaintiffs prevail on the basis of the very same unwarranted inferences that has already been rejected. In so doing, the Michigan Court of Appeals has resurrected a flawed standard that conflicts with ordinary contract interpretation principles. Under the Court of Appeals' *Kendzierski* decision, a municipality must point to express anti-vesting language to avoid a presumption that retiree health benefits are vested and for life. If this decision is allowed to stand, every Michigan municipality that provides retiree health benefits will face an uncertain financial future and will be subject to contract interpretation decisions that ignore the parties' actual intent and may be placed on the path toward financial ruin.

The *amicus curiae* respectfully request that this Court: (a) grant Macomb County's Application for Leave and overturn the Michigan Court of Appeals' flawed decision, (b) direct lower courts to avoid the use of inferences, and the rule of reasonable expectations, which ignore the intent of the contracting parties, (c) require parties advancing claims of lifetime, vested health benefits to identify express language in the contract supporting those claims and (d) restore the

use of ordinary contract interpretation principles in cases involving collectively-bargained retiree health benefits.

II. STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Municipal League (MML) is a Michigan non-profit corporation whose purpose is to improve municipal government and administration through cooperative effort. Its membership is comprised of 520 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund (the "Legal Defense Fund"). MML operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

Through effective representation of its membership before the judicial, legislative, and executive branches of government on issues of importance to municipalities, the MML works to make Michigan's communities better by thoughtfully innovating programs, energetically connecting ideas and people, actively serving members with resources and services, and passionately inspiring positive change for Michigan's greatest centers of potential: its communities. The MML appears before this Court as a representative of 520 local governments it represents, all of which are potentially affected by the dispute in this case.

The Michigan Association of Counties is an alliance of Michigan counties working to enhance county government through advocacy, shared services and education. Founded in 1898, the Michigan Association of Counties is the only statewide organization dedicated to the representation of all county commissions in Michigan. The Michigan Association of Counties is a nonpartisan, nonprofit organization that advances education, communication and cooperation among county government officials in Michigan. The Michigan Association of Counties is the counties' voice at the state and federal level, providing legislative support on key issues affecting

counties. The Michigan Association of Counties has a distinct interest in ensuring that proper principles of ordinary contract interpretation are applied to labor agreements entered into by its members.

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of more than 1,230 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, exchange of information and guidance to, and among, township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statute of the State of Michigan.

The State Bar of Michigan, Public Corporation Law Section is a voluntary membership section of the State Bar of Michigan, comprised of approximately 600 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to public law. The Section provides education, information and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs and publications. The Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Section participates in cases that are significant to governmental entities throughout the State of Michigan.

The issues in this case are of critical concern for all municipalities that have provided, currently provide or are considering providing employees with health benefits upon retirement. The Court of Appeals' decision ignores established precedent regarding the interpretation of collective bargaining agreements. It disregards durational language regarding the expiration of

the collective bargaining agreements. It utilizes unwarranted and unsupported inferences in favor of finding a non-existent promise to provide retirees with lifetime health benefits, even where the Court of Appeals conceded that the collective bargaining agreements did not expressly provide for lifetime, vested health benefits. Overall, the Court of Appeals' decision vastly expands the likelihood that other courts will erroneously require a municipality to provide its retirees with vested, lifetime, health benefits in the absence of contractual intent. The members of each amicus curiae have a significant interest in the application of correct rules of contract interpretation regarding language discussing retiree health benefits and correcting a Court of Appeals decision that strays from established case law.

III. STATEMENT OF FACTS

Amici adopt the statement of facts set forth in the Application for Leave to Appeal submitted by Defendant-Appellant County of Macomb.

IV. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition *de novo* to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). To make this determination for a motion brought under MCR 2.116(C)(10), this Court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id* at 120. Summary disposition will be affirmed only when no genuine issue regarding any material fact exists and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*. Plaintiff cannot rely on the hope that the trier of fact will

disbelieve the movant's denial of a disputed fact or show that there is some metaphysical doubt as to the material facts, but must present affirmative evidence to defeat a properly supported motion for summary disposition. *McCart v Thompson, Inc*, 437 Mich 109, 115 n 4; 469 NW2d 284 (1991). Failure to rebut evidence from the moving party that no genuine issue of material fact exists requires the trial court to grant summary disposition. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 725-726; 691 NW2d 1 (2005).

V. LAW AND ARGUMENT

A. The Michigan Court of Appeals' Decision violates *Wilkie v Auto-Owners Ins Co*, 469 Mich 41 (2003) and the "First Out" Rule

For thirty-three years, Courts in Michigan applied a doctrine called the rule of reasonable expectations. This approach permitted Judges to examine a written contract, divine the parties' reasonable expectations when entering into the contract and then rewrite the contract accordingly. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52 (2003). Along the way, Courts observed that the rule of reasonable expectations was offensive and deprived the parties of the benefit of the deal they had negotiated. The Supreme Court noted in 1982 that "the expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable . . . . But to allow such a person to bind another to an obligation not covered by the contract as written because the first person thought the other was bound to such an obligation is neither reasonable nor just." *Raska v Farm Bureau Ins Co*, 412 Mich 355, 362-63 (1982). In 1999, the Supreme Court observed that the rule of reasonable expectations should never be used as a means to find ambiguity where none exists, so that Judges may reform a contract. *See Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 567-68 (1999)(holding that utilizing a party's "understanding" of a clearly written contract term is "contrary to the most fundamental

principle of contract interpretation – the court may not read ambiguity into a policy where none exists").

In 2003, this Court put the rule of reasonable expectations to the sword, finding that "[t]his approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie*, 469 Mich at 51-52 (noting that free citizens may reach agreements regarding their affairs without government interference and the courts will enforce those agreements; these principles are "ancient and irrefutable"). The Supreme Court held that the rule of reasonable expectations clearly has no application to unambiguous contracts, and that a party's alleged "reasonable expectations" should never be utilized to supersede the clear language of a contract. *Id* at 60 (a contracting party cannot be said to have reasonably expected something different from the clear language of the contract).[1]

Here, the Court of Appeals' decision flies directly in the face of *Wilkie*. Although it steered clear of expressly stating that it applied the rule of reasonable expectations, the Court of Appeals clearly did so. As set forth below, the collective bargaining agreements have no language promising retirees either "lifetime" or "vested" benefits. At the same time, they possess a general durational clause stating that each collective bargaining agreement terminates

[1] Although *Wilkie* concerned the interpretation of an insurance policy, it has been applied to all types of contracts – including collective bargaining agreements – and is not limited to insurance contracts. *See Macomb County v AFSCME Council 25*, 494 Mich 65 (2013)(applying *Wilkie* to interpretation of a collective bargaining agreement); *Coates v Bastian Brothers, Inc*, 276 Mich App 498 (2007)(applying *Wilkie* to a non-competition agreement); *Jasso v Orion Marketplace Development Co*, 2007 WL 2062079 (Mich App April 10, 2007)(applying *Wilkie* to a dispute regarding a purchase agreement).

in three years. In other words, the collective bargaining agreements unambiguously do not promise lifetime, vested benefits. Notwithstanding this, and by accident or design, the Court of Appeals fabricated – out of whole cloth – a latent ambiguity as a justification to focus on the unexpressed expectations of the parties. (Slip Opinion at p 3)(finding a latent ambiguity allowing consideration of extrinsic evidence and "interpretation"). As noted below, the Court of Appeals went so far as to claim that a 2014 Macomb County Bond Proposal, drafted by an individual who had never even participated in the negotiation of retiree health benefits, somehow allowed the Court to find that the parties intended the bargaining agreements to provide for lifetime, vested health benefits, even though they never contained those words. This is nothing more than a disguised attempt to apply the rule of reasonable expectations, fourteen years after the Michigan Supreme Court, in *Wilkie*, overruled every prior case that utilized that rule of construction. For this reason alone, the Michigan Court of Appeals' decision requires reversal.

The Court of Appeals committed a second error by ignoring a prior Court of Appeals decision in conflict with its own decision in *Kendzierski*. In 1983, the Sixth Circuit's *Yard-Man* decision directed courts to utilize what amounted to retiree-friendly "inferences" and presumptions that almost always resulted in holdings that lifetime, vested benefits had been promised to retirees. *UAW v Yard-Man*, 716 F.2d 1476 (6th Cir 1983)(applying a presumption that retiree health benefits would generally last as long as retirement status continued). The United States Supreme Court, as discussed more fully below, overruled *Yard-Man* and directed courts to use traditional rules of contract interpretation, without the use of inferences, to determine whether lifetime, vested health benefits had been promised. *M&G Polymers, Inc v Tackett*, 135 SCt 926 (2015).

That same year, the Michigan Court of Appeals formally acknowledged the overruling of *Yard-Man* and concluded that *Tackett* was fully consistent with Michigan's contract jurisprudence. *Harper Woods Retirees Ass'n v City of Harper Woods*, 312 Mich App 500, 511-12 (2015). Accordingly, *Harper Woods* directed courts to cease using retiree-friendly inferences and presumptions, to avoid construing ambiguous writings as creating lifetime commitments, to require a "clear manifestation of intent" before conferring a benefit or obligation and to avoid finding a lifetime promise where collective bargaining agreements are silent regarding duration or vesting. *Harper Woods Retirees Ass'n*, 312 Mich App at 512.

Although the Michigan Court of Appeals, in *Kendzierski*, acknowledged the existence of *Harper Woods* in passing, it did exactly what *Tackett* and *Harper Woods* directed courts not to do – it found the existence of a lifetime promise notwithstanding the lack of "lifetime" or "vested" language, and did so through reliance on inferences. (Slip Opinion at pp 3-4). In other words, the Michigan Court of Appeals behaved as if *Harper Woods* had not existed. This directly violates the "first out" rule of MCR 7.215(J), which requires a Court of Appeals panel to either follow a prior published Court of Appeals decision, or declare a conflict under MCR 7.215(J). *See Romain v Frankenmuth Mut Ins Co*, 483 Mich 18 (2009). Because the *Kendzierski* panel did neither, its Opinion is subject to immediate correction and reversal.

B. Retiree Health Benefit Agreements – Applicable Legal Principles

1. The Contextual Legal Background

Claims of lifetime welfare benefits must be scrutinized by courts to avoid undermining "Congress' considered decision that welfare benefit plans not be subject to a vesting requirement." *Adams v. Avondale Indus.*, 905 F2d 943, 947 (6th Cir 1990); *see also, Bauer v. RBX Indus.*, 368 F3d 569, 584 (6th Cir 2004) (citing *Avondale* in a negotiated employee welfare

benefit dispute). Thus, for union–represented employees, courts may not find a vested right to welfare benefits unless it is rooted in the collective bargaining agreement. *See also Kellogg Co v. NLRB*, 457 F2d 519, 525 (6th Cir 1972) (courts may not create contracts for the parties); *H.K. Porter Co v NLRB*, 397 US 99, 107-08 (1970) (the Board acts only "to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties"); *M&G Polymers USA, LLC v Tackett*, 135 SCt 926, 933, 936-37 (2015)(collective bargaining agreements must be interpreted according to ordinary principles of contract law; ambiguous writings should not be construed to create lifetime promises). Absent a vesting agreement, the employer has the unfettered right to modify or discontinue retiree insurance benefits upon expiration of the collective bargaining agreement creating them.

Consistent with *Avondale*, the Sixth Circuit has noted that promises of lifetime benefits may not be lightly inferred. *See Heheman v E.W. Scripps*, 661 F2d 1115, 1121 (6th Cir 1981) (requiring very persuasive evidence to overcome courts' traditional reluctance to find lifetime guarantees in employment contracts); *cert. denied*, 456 US 991 (1982); *Sprague v General Motors Corp.*, 133 F3d 388, 400 (6th Cir 1998) ("an employer's commitment to vest [welfare] benefits is not to be inferred lightly"). As a general rule, contractual obligations do not extend beyond the term of a contract. *See, e.g., Litton Financial Printing Division v NLRB*, 501 US 190, 207 (1991) ("explicit terms" are required to create benefits surviving the expiration of a collective bargaining agreement). The burden always remains with Plaintiffs to establish that the exception to the general rule applies. *Yolton v. El Paso Tennessee Pipeline Co*, 435 F3d 571, 579-80 (6th Cir), *cert denied*, 127 SCt 555 (2006).

2. The *Yard-Man* decision and its flawed, retiree-friendly inferences

Prior to 2015, the analysis of retirees' claims of lifetime health benefits was controlled by

Yard-Man, where the Sixth Circuit recognized that a purpose to vest welfare benefits "must necessarily find its genesis" in the collective bargaining agreement itself. 716 F2d at 1479.

To determine whether the parties intended to vest welfare benefits, courts apply traditional rules of contract interpretation. Courts initially consider the explicit language of the labor agreement, viewing each provision as part of an integrated whole. "If possible, each provision should be construed consistently with the entire document and the…purposes of the parties." *Yard-Man*, 716 F2d at 1479. The objective is to "settle on an interpretation which is harmonious with the entire agreement" and consistent with federal labor policy. *Golden v Kelsey-Hayes Co*, 73 F3d 648, 654 (6th Cir 1996), citing *Yard-Man*, 716 F2d at 1480. Of course, the burden of proof rests at all times with plaintiffs. Employers do not have to prove that they did not agree to a lifetime benefit.

In *Yard-Man*, as the Michigan Court of Appeals did here, the Sixth Circuit Court of Appeals reached the conclusion that the collective bargaining agreements at issue contained promises to provide retirees with lifetime, vested health benefits notwithstanding the presence of any express labor agreement language supporting this conclusion. Instead, *Yard-Man* based its conclusions on a number of unwarranted inferences, including the following: (a) the unlikelihood that retiree health benefits, which could be understood as a form of delayed compensation, would be left to the contingencies of future negotiations; (b) the inclusion of specific durational language as to the savings and pension program (i.e., a statement that the program only continued for the duration of the labor agreement) and the absence of such specific durational language as to retiree health benefits); (c) language stating that the Company would pay for an early retiree's health insurance upon reaching age 65, where employees could retire at age 55; (d) the fact that retiree health benefits are "status" benefits which carry with them a presumption that

they will continue for as long as retirement status is maintained; and (e) Yard-Man's continuation of health benefits for retirees for some period after it closed the plant at which the retirees were employed. *Yard-Man*, 716 F2d at 1481-82. To reach the conclusion that the collective bargaining agreements promised lifetime benefits, *Yard-Man* effectively nullified the general duration clause in each agreement that set forth the date upon which the agreement expired. The Sixth Circuit reasoned that the duration clause did not apply to retiree health benefits because it was not specifically tied to those benefits. *Id* at 1482-83.

In other words, despite protestations to the contrary, *Yard-Man* created a standard where courts started from a presumption that retiree health benefits were vested and for life, and required employers to point to specific anti-vesting language to prevail. *See Cole v ArvinMeritor, Inc*, 549 F3d 1064, 1074 (6th Cir 2008)(wherein the Sixth Circuit acknowledges that "there is a reasonable argument to be made that, while the court has repeatedly cautioned that *Yard-Man* does not create a presumption of vesting, [it] ha[s] gone on to apply just such a presumption").

3. The US Supreme Court abrogates *Yard-Man*

In *M&G Polymers USA, LLC v Tackett*, 135 SCt 926 (2015), the United States Supreme Court expressly overruled *Yard-Man*. There, union-represented retirees alleged that M&G violated collectively bargained agreements by failing to provide them with lifetime, contribution-free health care benefits. *Tackett*, 135 SCt at 930. The District Court dismissed Plaintiffs' claims, finding that the labor agreements, which had expired by their terms, unambiguously did not create a vested right to retiree health benefits. The Court of Appeals reversed and remanded, based on the application of the *Yard-Man*'s inferences. *Id* at 932. Following the entry of a

permanent injunction by the District Court, which was affirmed by the Sixth Circuit, the United States Supreme Court granted certiorari.

The United States Supreme Court vacated the Sixth Circuit's *Tackett* decision. Vacating an injunction in favor of the retirees, the Supreme Court held that collective bargaining agreements must be interpreted according to ordinary principles of contract law, and that the parties' intentions should control. Thus, where the words of a contract are clear and unambiguous, its meaning is to be ascertained with its plainly expressed intent. *Id* at 933. *Tackett* held that *Yard-Man* did not represent ordinary principles of contract law, and violated those principles by "placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements," distorting the attempt to ascertain the intent of the parties. *Id* at 935. Specifically, the Supreme Court rejected *Yard-Man's*: (a) unsupported inference that the parties to a labor agreement intend to have health benefits continue throughout retirement; (b) premise that retiree health benefits are a form of deferred compensation; (c) refusal to apply general durational clauses to provisions governing retiree health benefits; (d) affirmative requirement that employers identify a specific durational clause for retiree health care benefits to prevent vesting; (e) failure to require that the intent to vest benefits must be found "in the plan documents and must be stated in clear and express language;" and (g) failure to consider the traditional principle that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id* at 935-37.

In lieu of the retiree-friendly, unwarranted inferences employed by *Yard-Man*, *Tackett* directed lower courts to employ the following standard:

> That principle [that "that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement"] does not preclude [a] conclusion that the parties intended to vest lifetime benefits for retirees. Indeed, we have already recognized

> that "a collective-bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement's expiration. *Ibid*. ***But when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.***

Tackett, 135 SCt at 937 (emphasis added).

4. *Tackett* Accurately Represents Michigan Law Regarding the Interpretation of Collective Bargaining Agreements

Following *Tackett*, the Michigan Court of Appeals addressed a retiree health benefit lawsuit in *Harper Woods Retirees Association v Harper Woods*, 312 Mich App 500 (2015). There, the retirees challenged the City's unilateral decision to alter their retiree health benefits, which resulted in the imposition of additional copays, deductibles and other costs. The lower court dismissed Plaintiffs' claims, finding that the changes were, under *Reese v CNH America LLC*, 694 F3d 681 (6th Cir 2012), reasonable and therefore did not violate the labor agreements. *Harper Woods*, 312 Mich App at 505.

On appeal, the retirees argued that their right to specific healthcare benefits included in their collective bargaining agreements continued throughout their retirement, "regardless whether the explicit terms of the contracts indicated that the parties intended those benefits to continue after the agreement expired." *Id* at 511. The Michigan Court of Appeals rejected that contention, finding that "[s]uch a position is inconsistent with ordinary principles of contract law." *Id.* The Court of Appeals also acknowledged that the United States Supreme Court had overruled *Yard-Man*, that its inferences were no longer good law, and that *Tackett* was now the applicable standard for retiree health benefit cases in Michigan. It further held that when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life. *Id* at 512-13. The Michigan Court of Appeals held: "[w]e conclude that the Supreme Court's reasoning in *Tackett* is consistent with Michigan's

contract jurisprudence regarding CBAs, which applies with equal force in both the public and private sectors." *Id*. at 513 (directing courts to examine each of the CBAs in effect at the time of each retiree's retirement, and to determine: (1) whether the language governing retiree healthcare benefits indicates that the parties intended the same benefits to continue after expiration of the agreements, and (2) whether the benefits terminated at expiration of the agreements, so that defendant was permitted to alter the benefits under future contracts).

C. The Lower Court Impermissibly Applied *Yard-Man's* inferences, ignored traditional rules of contract interpretation and violated *Tackett*

Although the Michigan Court of Appeals nominally acknowledged that *Yard-Man* and its inferences had been overruled, the Court nonetheless effectively applied those very same inferences to rule in favor of the retirees. Despite noting that the collective bargaining agreements were silent on the issue of whether health benefits were vested, the Court of Appeals engaged in the wholesale importing of unwarranted inferences to reach the tautological conclusion that there was a latent ambiguity and that the benefits vested.

The Court of Appeals erroneously held that the fact that the collective bargaining agreement permitted continuation of coverage for a surviving spouse of a retiree must have meant that the parties intended health benefits to vest. (Slip Opinion, pp. 3-4). It also concluded that the collective bargaining agreements' statement that coverage may be terminated if a retiree fails to enroll in Medicare at age 65 must have meant that the parties intended for coverage to outlast the three-year term of the CBA, given that the an individual may retire before age 65.[2] In

[2] In other words, the Michigan Court of Appeals engaged in the very same faulty "illusory promise" analysis created by *Yard-Man* and rejected by *Tackett* as a misapplication of traditional principles of contract law. *Tackett*, 1235 SCt at 936 (holding that a promise that is "partly" illusory is by definition not illusory. "If it benefits some class of retirees, then it may serve as consideration for the union's promises").

a similar vein, the Michigan Court of Appeals reasoned that the collective bargaining agreements' suspension of health coverage while a retiree had health coverage through another employer, and reinstatement of coverage upon that other coverage ending, demonstrated that the parties contemplated that coverage could resume after the three-year term of a labor agreement. *Id.* Finally, the Court went outside the four corners of the labor agreements and, instead, relied on a statement in a 2014 bond funding proposal regarding the supposed lifetime duration of retiree health benefits. *Id.*

The Court of Appeals' decision – even as the Court denied doing so – clearly relied on the very same inferences employed by the Sixth Circuit in *Yard-Man*. *See, e.g.*, *Yard-Man*, 716 F2d at 1481 (citing, as evidence of a lifetime promise, the fact that the labor agreements promised to pay an early retiree's insurance upon such retiree reaching age 65; "Since an employee is entitled under the collective bargaining agreement to retire at 55, the company's promise could remain outstanding for a ten-year period. If retiree insurance benefits were terminated at the end of this collective bargaining agreement's three-year term, this promise would be completely illusory for many early retirees under age 62"). In short, the Court of Appeals placed a thumb on the scale in favor of vesting, and effectively required the County of Macomb to prove express anti-vesting language, which the United States Supreme Court has concluded is improper. *See Tackett*, 125 SCt at 935, *citing Cole v ArvinMeritor, Inc*, 549 F3d 1064, 1074 (6th Cir 2008)(wherein the Sixth Circuit acknowledges that "there is a reasonable argument to be made that, while the[e] court has repeatedly cautioned that *Yard-Man* does not create a presumption of vesting, [it] ha[s] gone on to apply just such a presumption").

1. The Michigan Court of Appeals Ignored the Duration Clauses in the CBAs

In its Opinion, the Court of Appeals committed a substantial, severe and outcome-determinative error by failing to analyze or even acknowledge the existence of a general durational clause in each of the relevant collective bargaining agreements. As noted in Appellant's Application for Leave to Appeal, the general durational clause provided that "This Agreement shall continue in full force and effect until ____ [date]."

Yard-Man, had concluded that a general durational clause had no impact on the question of whether retiree health benefits vested because that clause was not specific to those benefits. *Yard-Man*, 716 F2d at 1482-83. *Tackett* overruled that faulty conclusion. *Tackett*, 135 SCt at 936 (holding that "[f]urther compounding this error, the Court of Appeals has refused to apply general durational clauses to provisions governing retiree benefits). *Tackett* further explained that the failure to apply such a clause conflicts with the "rule that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement,'" *id* at 930 (quoting *Litton*, 501 US at 206), and that decisions that ignore such clauses "distort the text of the agreement and conflict with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." *Id* at 936 (citing 1 W. Story, Law of Contracts § 780 (M. Bigelow ed., 5th ed. 1874) and 11 Williston § 31:5).

In *Cole v Meritor, Inc*, the Eastern District of Michigan held that collective bargaining agreements stating that retiree health benefits "shall be continued" evidenced a promise to provide lifetime, vested health benefits, even though each labor agreement also contained a general duration clause setting forth an explicit termination date for the agreement. The court ruled that the "shall be continued"[3] language "unambiguously promised retiree healthcare

[3] The Sixth Circuit has recently noted that "[n]o court [outside the Sixth Circuit] to our knowledge has found, or would find, a promise of lifetime unalterable healthcare benefits based
Continued on next page.

benefits for life" and that the general duration clause "could not trump contractual promises of lifetime benefits." *Cole v Meritor, Inc.*, 855 F3d 695, 700 (6th Cir 2017). The Sixth Circuit initially affirmed, but reconsidered following *Tackett* and reversed.

A few months ago, the Sixth Circuit concluded that the Eastern District of Michigan's failure to give effect to the general duration clause, and conclusion that "shall be continued" meant a lifetime promise, were both erroneous and without any support. The Court held:

> The CBAs also contained durational clauses that supplied a concrete date of expiration for retiree healthcare benefits. These durational clauses give meaning to the promise that healthcare benefits "shall be continued." That is, Meritor guaranteed healthcare benefits only until the expiration of the final CBA, nothing more. This result is in line with the ordinary principles of contract law, which dictate that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement."

Cole, 855 F3d at 700; *See also, Gallo v Moen, Inc*, 813 F3d 265, 271-72 (6th Cir 2016)(holding that the CBAs' general durational clauses "provide a baseline or default rule, a point at which the agreements expire absent more specific limits relevant to a particular term. In the absence of specific language *in the retiree healthcare provisions*, the general durational clause controls")(*emphasis added*).

In *Gallo*, Moen entered into a series of three year collective bargaining agreements with its union that provided for retiree health benefits. The agreements stated that Moen would provide the retirees with healthcare coverage at its cost. *Gallo*, 813 F3d at 267. When Moen closed its last plant in 2008, the plant closure agreement reflected that healthcare coverage for retirees "shall continue" as indicated under the prior collective bargaining agreement. *Id.* After Moen made changes to retiree health benefits in 2013, the retirees sued Moen for failing to

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on CBA language of this sort in a time-limited agreement." *See Gallo v Moen, Inc*, 813 F3d 265, 271 (6th Cir 2016)

provide lifetime, vested healthcare benefits. Applying *Tackett*, the Sixth Circuit rejected *Yard-Man*'s inferences and examined the text of the collective bargaining agreements. *Gallo* noted that the agreements' silence as to the duration of retiree health benefits prevented it from inferring vested, lifetime benefits. *Id* at 268-69. The Court also applied the general durational clauses contained in the collective bargaining agreements, and concluded that the agreements "do not provide unalterable healthcare benefits for life" to the retirees. *Id* at 269 ("When a specific provision of the CBA does not include an end date, we refer to the general durational clause to determine that provision's termination"). In so holding the Court fixed its analysis on the collective bargaining agreements, which contained no language promising lifetime, vested benefits. *Id.* The Court also squarely addressed the "will/shall be continued" language, properly concluding that, when viewed in conjunction with the general durational clause, this language guarantees benefits "until the agreement expires, nothing more." *Id.*

The Sixth Circuit has also – as the Michigan Court of Appeals should have done here – rejected the "contractual context" arguments advanced by Plaintiffs to show a lifetime promise notwithstanding the contracts' lack of reference to such an alleged promise. For example, Plaintiffs contended that the labor agreements' imposition of caps on retiree costs, and examples of how the caps would operate when a retiree reached age 80, must have meant that the parties intended benefits to be provided for life. The Sixth Circuit held that while such caps and examples showed that the parties contemplated that retiree health benefits would continue, "the fact that they anticipated, or even hoped, that these benefits would continue does not mean that Meritor is bound to provide these benefits for the life of the retirees." *Id* at 701; *Gallo*, 813 F3d at 269 (holding that "we should not expect to find lifetime commitments in time-limited agreements….").

Although the Court of Appeals here was misled by the existence of a 2014 Bond Proposal which apparently used the word "lifetime" to describe benefits, the *Cole* panel explained how such evidence should be viewed in the context of a collective bargaining agreement with a general duration clause and no corresponding language promising that benefits would be "vested" or "for life." There, the Sixth Circuit held that such "lifetime" language in documents outside the four corners of the labor agreement merely reflected that the parties:

> Simply assumed that the benefits would continue for life because neither side…had any reason to think that any future CBA would alter the pattern of the next several decades. This likely led to "loose talk" about lifetime healthcare benefits, with no one feeling the need to articulate the implied caveat *that these benefits, like all employee benefits not explicitly vested for life, were dependent on the existence of a current CBA between Meritor and the UAW*.

Cole, 855 F3d at 702 (emphasis added).

As noted above, the collective bargaining agreements entered into by the County of Macomb and the retirees contained: (a) clear and unambiguous language stating that the agreements expired by their terms three years after their effective date(s); and (b) no specific language stating that retiree health benefits lasted for a different duration. The recent Supreme Court and Sixth Circuit decisions are "consistent with Michigan's contract jurisprudence regarding [collective bargaining agreements." *Harper Woods Retirees Ass'n v City of Harper Woods*, 312 Mich App 500, 513; 879 NW2d 897 (2015). Correctly applying Michigan law, this general durational language should have been given its clear and unambiguous meaning, especially given the absence of specific language indicating that retiree health benefits would last for a longer duration. *See Tackett*, 135 SCt at 935-37 (2015); *Gallo*, 813 F3d at 260 (Absent a longer time limit in the context of a specific provision, the general durational clause supplies a final phase to every term in the CBA), *citing Litton Fin Printing Div*, 501 US at 207 (holding

that when a specific CBA provision does not include an end date "we refer to the general durational clause to determine that provision's termination").

Instead, the Michigan Court of Appeals failed to even address the existence of the general durational clause in each collective bargaining agreement, let alone apply it. By doing so, the Court of Appeals effectively re-wrote the parties' collective bargaining agreement, striking the parties' express, agreed-upon intent that the agreements, and all promises contained within them, ended three years after their formation. The lower courts' decisions "distort[s] the text of the CBAs by refus[ing] to apply general durational clauses to provisions governing retiree benefits." *Gallo*, 813 F3d at 270, *citing Litton*, 135 SCt at 936. Accordingly, this Court should grant the County of Macomb's Application for Leave and reverse.

2. The Michigan Court of Appeals Erroneously Concluded, based on Extraneous "evidence," that Ambiguity Existed Notwithstanding the CBAs' silence on Vesting

The Michigan Court of Appeals concluded that the collective bargaining agreements "are silent on the issue whether the healthcare benefits" are vested. (Slip Opinion, p. 3). In other words, the Court of Appeals acknowledged that not a single collective bargaining agreement stated that the benefits were promised "for life" or that they were "unalterable." As a matter of law, this should have, when combined with the general durational clause, ended the Court's inquiry in favor of the County of Macomb. *Harper Woods Retirees Ass'n*, 312 Mich App at 512, *citing Tackett*, 135 S.Ct. at 937 (holding that "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life").

Instead, the Court of Appeals continued searching for "evidence" of a promise that was never contained within the four corners of the contract. It did not stop until it found that "evidence" in the form of the very same unwarranted inferences created by *Yard-Man* and cast

aside by *Tackett* as violating ordinary principles of contract interpretation. For the reasons stated above, reliance on these inferences constitutes reversible error.

The Court of Appeals also located the support for its erroneous conclusions in extrinsic evidence beyond the four corners of the relevant collective bargaining agreements. As a matter of law, this was improper and requires reversal, first and foremost because the collective bargaining agreement is not ambiguous. *Gallo*, 813 F.3d at 273 (holding that the "first and best way to divine the intent of the parties is from the four corners of their contract and from traditional canons of contract interpretation. That language and these canons offer no evidence of any intent to fix these benefits permanently into the future"). As in *Gallo*, the collective bargaining agreement language here does not include any statements indicating that the parties intended retiree health benefits to vest, or last for life. Given this, the Court of Appeals' inquiry should have started and ended with the application of the unambiguous general durational clauses. *Id* at 269.

Instead, the Court of Appeals turned to extrinsic evidence, placing a particular emphasis on a letter accompanying a 2014 bond proposal, written by the Macomb County Executive, containing hopeful "lifetime" statements regarding retiree benefits.[4] There is no evidence that the County Executive had personally participated in the negotiation of the collective bargaining agreements at issue, or that the County Executive had participated in *any decisions* regarding the negotiation of health benefits for retirees. Accordingly, the statement was inadmissible hearsay and should not have been used as the basis for a finding that the County agreed to provide

[4] The Court of Appeals ignored, however, the absence of any statements within the letter describing the benefits as "vested," or "unalterable." Instead, the letter referred to "vested" employees, *not* vested health benefits. The Court of Appeals seized on the reference to vested employees to justify its conclusions, failing to recognize the difference between pension benefits, which are vested by operation of law, and health benefits, which are not. (Slip Opinion at p. 4).

lifetime, vested retiree health benefits. *Thompson v City of Lansing*, 410 Fed Appx 922, 930-31 (6th Cir 2011)(statements by employees that concern decisions to which they were not a party are outside the scope of their employment and constitute inadmissible hearsay).

In other words, the Court of Appeals erroneously utilized a letter written in 2014 to interpret collective bargaining agreements negotiated ten, fifteen and even twenty years earlier. And it did so without any basis for believing that the County Executive who wrote the letter possessed personal knowledge regarding the negotiations. Extrinsic events that occur after the expiration of the collective bargaining agreement should not be utilized to conjure up evidence of a lifetime promise where none occur within the agreement. *See Gallo*, 813 F3d at 273 (rejecting the argument that there must have been an agreed-upon lifetime promise in expired CBAs because Moen continued paying for healthcare benefits for five years after the agreement expired; "That a company to its credit hopes to subsidize healthcare benefits for its retirees for as long as possible does not mean it has promised to do so, and above all such action does not mean that it has no right to alter those benefits in the future to account for changes to its healthcare plans for employees….").

The Court of Appeals also attempted to justify its faulty conclusion by noting that retiree healthcare benefits were only provided to employees with vested pension rights, with the implication being that tying health care benefits to pension benefits somehow demonstrated the existence of a promise to provide lifetime, vested health care benefits to retirees. (Slip Opinion at p. 4). Although this pension tie-in argument was extensively utilized by courts in the past to support a finding of vested benefits, the United States Supreme Court and Sixth Circuit have since rejected the pension tie-in argument as yet another unwarranted inference. *Cole*, 855 F3d at 701)(rejecting pension tie-in argument, and holding that the difference in treatment of pension

benefits and retiree health benefits demands the conclusion that health benefits are intended to last for some period of time less than the lives of the retirees); *Tackett*, 135 SCt at 937 (rejecting *Yard-Man's* use of the inference that evidence of a lifetime promise is present where only pension-eligible retirees receive health care benefits).

At the same time, the Court of Appeals failed to note or even consider the absence of extrinsic evidence demonstrating that neither party intended that retiree health benefits would be vested or for life. For example, the Court of Appeals did not acknowledge the absence of a single retiree proposal that the County agree to provide vested, lifetime benefits, or the acceptance of such a non-existent proposal to provide vested, lifetime benefits.

Given the foregoing, the Court of Appeals reached a defective result, which should be corrected. *See Sprague v General Motors Corp*, 133 F3d 388, 400 (6th Cir 1998)(holding that because vesting of health benefits is not required by law, an employer's commitment to vest such benefits is not to be inferred lightly; the intent to vest "must be found in the plan documents and must be stated in clear and express language").

D. Failing to Correct the Michigan Court of Appeals' Decision Will Mislead Other State Courts into Substituting Inferences for Actual Negotiated Contract Language

If the Court of Appeals' decision is allowed to stand, every municipality that has ever entered into an agreement to provide its retirees with health benefits, or who will do so in the future, stands at risk of having a court jump to the unsupported conclusion that – much to the municipality's surprise – it had agreed to provide retirees with lifetime, unalterable health benefits. In other words, judicially-created constructs will burden municipalities with

obligations to which they never agreed.[5]

Such a regime has the potential to devastate Michigan counties, cities, villages and townships by saddling them with the heavy costs of providing former employees with health care benefits, and with no offsetting revenue increases, far into the future. This doomsday scenario is not at all hypothetical, as the State of Michigan has already had to appoint emergency managers in Flint, Pontiac, Benton Harbor, Ecorse, Lincoln Park, Highland Park, Allen Park, Hamtramck and Detroit – in large part – due to the extraordinary costs of providing retirees with health benefits. Detroit was also driven to file a municipal bankruptcy, in part, to address such benefits.

This case demands that the Supreme Court intervene to reaffirm the application of ordinary principles of contract interpretation to collective bargaining agreements and provide clear governing rules to lower courts as to how they should, and should not, evaluate claims seeking vested, lifetime retiree health benefits. It also provides the Supreme Court with an opportunity to head off the resurrection of the rule of reasonable expectations, and to direct courts to follow the "first out" rule.

VI. CONCLUSION

For the foregoing reasons, the Michigan Municipal League, Michigan Association of Counties, Michigan Townships Association, and State Bar of Michigan, Public Corporation Law Section, respectfully request that the Court grant leave to appeal and reverse the decision of the Court of Appeals.

[5] Allowing the Court of Appeals decision to stand may, in the short-term, seem as if it benefits retirees. However, the decision may also have the unintended consequence of convincing other municipalities across the state that, to avoid the risk of having a court conclude that they agreed to provide lifetime, vested health benefits, they are better off simply ceasing to provide any retirees with health benefits. Thus, not correcting the Court of Appeals decision may create an entire class of workers that are far worse off due to the dangers posed by allowing courts to reform or re-draft unambiguous collective bargaining agreements.

Respectfully submitted,

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Dated: August 28, 2017

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the TrueFiling system which will send notification of such filing to all counsel of record.

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